No. 96-716

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

JACK J. GRYNBERG,

Petitioner,

v.

HENRY KLEIN, GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LIMITED, an Israeli Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether there is any issue worthy of review by Writ of Certiorari with respect to the date from which post-judgment interest accrues on a punitive damages award pursuant to 28 U.S.C. § 1961.

Whether the Circuit Courts of Appeal have consistently applied this Court's holding in *Kaiser Aluminum & Chemical Corporation v. Bonjorno.*

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Gur Shomron, Amiram Grynberg, Henry Klein and Defendisk, Limited, respectfully submit the following Brief in Opposition to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari has its genesis in litigation filed 12 years ago. Respondents sought compensatory and punitive damages from the Petitioner for, *inter alia*, breach of contract and breach of fiduciary duty, related to a computer software system invented by them to prevent unauthorized copying and piracy of software. Eight years after the action was commenced, and after a six week jury trial, on March 31, 1992, judgment was entered on a jury verdict in excess of $500,000.00 in compensatory damages for breach of contract and breach of fiduciary duty, and for $3,000,000.00 in punitive damages ($1,000,000.00 for each Plaintiff).

On June 24, 1992, the District Court, after a hearing on post-trial motions, struck the jury's punitive damage award. Respondents appealed, and the Tenth Circuit reversed, holding that "[b]ecause there was testimony and other evidence to support the Plaintiffs' contentions and the jury was properly instructed on the reasonable doubt standard for exemplary damages, [there was] no reason to believe that the jury was incorrect in its determination that punitive damages were warranted." *Klein v. Grynberg*, 44 F.3d 1497, 1504 (10th Cir. 1995). The Tenth

Circuit, however, held that although a "sizeable exemplary award was warranted," the "$3,000,000.00 figure seems excessive", *Id.* at 1505, and directed the trial court to enter a remittitur. In doing so, the Tenth Circuit emphasized "that the Plaintiffs are entitled to significant punitive damages." *Id.* at 1507.

The District Court remitted the original punitive damages award to $200,000.00 per Plaintiff (for a total of $600,000.00), giving Respondents the option to accept the remittitur or undergo a new trial solely on the issue of punitive damages. Respondents accepted the remittitur in the interest of bringing this litigation to a close, and requested the District Court tax interest on the punitive damages award from March 31, 1992. The District Court refused and Respondents sought a recall of the Tenth Circuit's mandate for purposes of establishing March 31, 1992 as the date from which post-judgment interest began to accrue.

The Tenth Circuit recalled its mandate and correctly ordered that post-judgment interest accrue on the remitted punitive damages award from the date of entry of the original judgment. Emphasizing the degree to which its prior opinion reversed the District Court's striking of the punitive damages award, Pet. App. A at A-3, the Tenth Circuit properly held that its "reversal 'was not on any basic liability errors or errors in procedure which affected the basic issues, *but on a dollar value*, a matter of degree.' " *Id.* (quoting *Northern Natural Gas Company v. Hegler*, 818 F.2d 730, 737 (10th Cir. 1987)) (emphasis in original). Petitioner now seeks review of the Tenth Circuit's decision on the basis of a manufactured "split" among the Circuit Courts of Appeals which have had occasion to

consider a similar issue. Further, Petitioner advocates a unique and unnecessary change in the law regarding post-judgment interest solely as it relates to an award of punitive damages. As more fully set forth below, Petitioner's assertion that a split among the Circuits exists is false. Furthermore, there is no legitimate reason why this Court should establish an arbitrary rule for the accrual of post-judgment interest solely as to punitive damages.

REASONS FOR DENYING CERTIORARI

This Court, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), established the touchstone for determining the date from which post-judgment interest should accrue where several judgments exist as a result of either post-trial proceedings or appeals. The federal interest statute, 28 U.S.C. § 1961, provides that, "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a). The statute applies equally to awards of compensatory and punitive damages.

In *Kaiser*, this Court, in interpreting 28 U.S.C. § 1961, announced that post-judgment interest accrues only after an award of damages is " 'ascertained' in a meaningful way." *Kaiser*, 494 U.S. at 836. *Kaiser*, however, involved its own unique procedural situation. Naturally, the Circuit Courts of Appeals are required to apply the *Kaiser* standard to a broad spectrum of differing factual and procedural circumstances. Despite this, the various Courts of Appeals have applied the rule of *Kaiser* consistently and

the alleged conflict among the Circuits to which Petitioner points as a basis for certiorari is indeed not a conflict at all. Rather, the Circuit Courts of Appeals, including the First, Second, Third, Sixth, Tenth and Eleventh Circuits, have developed, consistent with *Kaiser*, additional tests for determining the date from which post-judgment interest accrues when factual and procedural nuances render a particular case different from *Kaiser*. Indeed, cases involving similar procedural postures have resulted in similar decisions which are in no need of further refinement.

Additionally, the purpose of punitive damages would not be served by awarding post-judgment interest, as Petitioner suggests, only after a punitive damages award is finalized after appeal. Doing so undermines statutorily provided monetary benefits to Respondents and provides a significant windfall to defendants such as Petitioner who have engaged in conduct "attended by circumstances of fraud, malice or wanton disregard of the rights and feelings of the plaintiff." *Klein*, 44 F.3d at 1503 (citing C.R.S. § 13-21-102). Petitioner's position also contravenes the purposes underlying the provision of post-judgment interest by encouraging abuse of the appellate process without the corresponding obligation to pay post-judgment interest should an appeal ultimately fail.

Application of the *Kaiser* standard to punitive damage awards remains proper and is not affected by recent Supreme Court decisions merely reaffirming federal constitutional standards applicable to punitive damages. *See BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996). *Kaiser* and subsequent interpretations by the Circuit

Courts of Appeals provide flexibility necessary to maintain a meaningful balance between the interests of a plaintiff and a defendant who, though having been found liable for malicious conduct, wishes to appeal a punitive damages award. Thus, this case involves neither a controversy among the various Circuit Courts of Appeals nor a substantial question of federal law which must be addressed in light of recent Supreme Court decisions.

I. THE DATES OF ACCRUAL OF POST-JUDGMENT INTEREST AWARDS HAVE BEEN CONSISTENTLY DETERMINED BY THE COURTS OF APPEALS.

The various Circuit Courts of Appeals have utilized, to the extent applicable, the mandate of *Kaiser* uniformly and consistently. Indeed, contrary to Petitioner's argument, differences among the circuits can be attributed solely to unique factual and procedural differences among the cases. The Tenth Circuit has consistently looked to the extent to which a particular judgment is reversed on appeal in determining the date from which post-judgment interest should accrue. Other Circuit Courts are in accord.

In *Kaiser*, the trial court found that the original jury verdict was not supported by the evidence, *Kaiser*, 494 U.S. at 835, and neither the plaintiff nor the defendant appealed that determination. *Id.*; *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 518 F. Supp. 102, 119 (E.D. Pa. 1981) (proof of plaintiffs damages was deficient such that

no reasoned basis could be found for setting an appropriate figure). After a limited retrial solely on the issue of damages, the jury again entered a verdict in favor of the plaintiff, which verdict was subsequently upheld on appeal. *Kaiser*, 494 U.S. at 830-831. The Supreme Court held that because "the judgment on damages was not supported by the evidence, the damages [had] not been 'ascertained' in any meaningful way", *Id.* at 836, and taxed post-judgment interest from the date of the second jury verdict. *Id.*

Petitioner argues that the First, Third and Tenth Circuits apply *Kaiser* narrowly while the Second, Sixth and Eleventh take a broader approach which would have ultimately led to a different decision in this case. The cases cited by Petitioner as applying *Kaiser* narrowly, however, involve distinct procedural circumstances; not a different substantive application of *Kaiser*.

In *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730 (10th Cir. 1987), the trial court's method of valuation of helium extracted from a natural gas stream was reversed and remanded. *Id.* at 732. The Tenth Circuit, in determining the date from which post-judgment interest accrued, looked to the extent to which the judgment on appeal was reversed. *Id.* at 737 (quoting *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335, 336 (10th Cir. 1979)). Where there exists "a large dollar difference but the reversal was not on any basic liability errors or errors in procedure which affected the basic issues but on a dollar value, a matter of degree", the court reasoned that the date of the original judgment should be utilized. *Id.* Similarly, in *Stewart v. Donges*, 20 F.3d 380 (10th Cir. 1994), cited by

Petitioner as being in conflict with *Kaiser*, the Tenth Circuit held that when:

> 'an initial quantified judgment is later decreased, interest runs from the date of the earlier quantified judgment and only on the amount ultimately allowed.' This rule is qualified by the caveat that in cases of reversal, the extent to which a judgment is invalidated on appeal determines whether the first judgment or the remand judgment triggers the accrual of post-judgment interest.

Stewart, 20 F.3d at 382 (citation omitted).[1] Petitioner, however, neglects the fact that *Stewart* explicitly distinguished *Kaiser*. "Thus, cases cited . . . which reach a contrary result but are based on appellate reversals which *substantively* and *substantially* alter the conclusion of the district court are inapposite." *Stewart*, 20 F.3d at 382 n.2 (emphasis added).

Petitioner's reliance upon *Cordero v. DeJesus-Mendez*, 922 F.2d 11 (1st Cir. 1990), as a case factually similar to this case and to *Kaiser*, is also misplaced. The First Circuit specifically distinguished *Kaiser*.

> Unlike *Kaiser*, adequate evidence supported the jury's award and unlike *FDIC v. Rocket Oil Co.*, [865 F.2d 1158 (10th Cir. 1989)], the jury's initial determination of liability was upheld. A fair damages award could have been made by the jury after the first trial in the present case had

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[1] *Stewart* relied upon the decisions of the Tenth Circuit in *Wheeler v. John Deere Co.*, 935 F.2d 1090 (10th Cir. 1991), and a later decision in the same case, *Wheeler v. John Deere Co.*, 986 F.2d 413 (10th Cir. 1993).

> the jury been instructed properly. Calculating interest from the date of the second judgment would penalize appellees for the trial judge's error . . . Because we believe that *Kaiser* does not control the present case, post-judgment interest on the modified damages award . . . shall accrue from the date of the first judgment.

Cordero, 922 F.2d at 18. The Sixth Circuit, contrary to Petitioner's argument, provides an additional example of the uniform application of the *Kaiser* standard. The very case cited by Petitioner, *Adkins v. Asbestos Corp., Ltd.*, 18 F.3d 1349 (6th Cir. 1994), demarcates the dividing line as to when damages are ascertained in a meaningful way.

In *Adkins*, the original judgment was "vacated in its entirety on the first appeal and the district court was ordered to support its award of damages with specific findings of fact and conclusions of law." *Adkins*, 18 F.3d at 1351. The Sixth Circuit, citing *Kaiser*, held that post-judgment interest should accrue from the date of the entry of the remanded judgment. Its holding, however, necessarily distinguished *Coal Resources, Inc. v. Gulf & Western Ind., Inc.*, 954 F.2d 1263 (6th Cir. 1992). In that case, the Sixth Circuit distinguished *Kaiser* "and awarded interest from the date of the original judgment because the original judgment *had not been vacated* on appeal but had simply been reduced by a certain amount following a court ordered remittitur." *Adkins*, 18 F.3d at 1351 (emphasis added). "[A]ccordingly, in *Coal Resources*, the Court concluded that because the damages had been meaningfully ascertained at the date of the original judgment, it was proper to award post-judgment interest from that date." *Id.* Thus, *Adkins* is factually and procedurally

distinguishable from *Coal Resources* because "the original judgment was vacated in its entirety on the first appeal and the district court was ordered to support its award of damages with specific findings of fact and conclusions of law." *Id.* at 1352.

Petitioner ignores these factual dissimilarities which uniformly govern the proper application of *Kaiser*. Simply put, a vacated judgment (as in *Adkins*), is both *factually* and *procedurally* distinct from a court ordered remittitur, (as in *Coal Resources* and the case at bar) and the Sixth Circuit's application of *Kaiser* is in accord with the other Circuit Courts of Appeals. *See* Pet. App. A at A-4, (citing *Litwinowicz v. Weyerhaeuser Steamship Co.*, 185 F. Supp. 692, 693-694 (E.D. Pa. 1960) (interest accrues on reduced amount from the date of judgment on the greater amount because the judgment was modified, not vacated); *Brockelherst v. PPG Industries, Inc.*, 907 F. Supp. 1106, 1109-1110 (E.D. Mich. 1995) (because plaintiffs consent to remittitur did not create a new judgment, but only modified a prior judgment, interest accrues from the date of the initial judgment)). *See also, Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 476 (8th Cir. 1977) (interest does not accrue on a vacated judgment).

The Second Circuit likewise follows the reasoning of the First, Third, Sixth and Tenth Circuits. Petitioner's reliance upon the decision in *Andrulonis v. U.S.*, 26 F.3d 1224 (2d Cir. 1994), ignores the substantive principles of law applicable to that case. *Andrulonis* involved a judgment "against the United States Government . . . under the Federal Tort Claims Act . . . and a third party claim for contribution brought by [the United States] Government against the New York State Department of Health

. . . under New York law." *Andrulonis*, 26 F.3d at 1227. The Second Circuit, not surprisingly, held that it was only when the United States government paid the plaintiff more than its pro rata share of the primary judgment that the "contribution award ripened into an ascertained judgment capable of sustaining an award of interest." *Id.* at 1234. Petitioner inexplicably ignores that this holding finds its basis in "third-party practice and the underlying *substantive law of contribution*." *Id.* at 1233 (emphasis added). "Because the underlying right to contribution is necessarily conditioned upon the defendants' satisfaction of the primary judgment, the judgment entered upon that claim should reflect this contingency." *Id.* at 1234. So construed, post-judgment interest could not be calculated on the contingent amount awarded *before* the date the contingency was satisfied. *Id.* at 1234-1235. Entirely consistent with *Andrulonis*, in *Indu Craft, Inc. v. Bank of Baroda*, 87 F.3d 614 (2d Cir. 1996), the Second Circuit held that when the jury's factual findings are not disturbed on appeal and the original judgment is substantiated by the evidence, post-judgment interest should accrue from the date of the original judgment. *Indu Craft*, 87 F.3d at 620.

The factual and procedural differences among the various cases cited above and by Petitioner do not create a conflict among the Circuit Courts of Appeals in their substantive application of *Kaiser*. Cases which do not involve vacated judgments, but rather, remanded or remitted judgments, consistently focus on the degree to which such judgments were reversed on appeal for purposes of determining the date from which post-judgment interest accrues. This approach, utilized by the Tenth Circuit in this case, as well as the First, Second, Third,

Sixth, Eighth and Eleventh Circuits, merely represents a uniform attempt to determine the point in time when damages have been "meaningfully ascertained" in the myriad of differing procedural postures with which the Courts of Appeals must deal. Consequently, there is no conflict among the circuits.

II. APPLICATION OF EXISTING STANDARDS TO POST-JUDGMENT INTEREST ON PUNITIVE DAMAGE AWARDS REMAINS PROPER.

Petitioner states that a Plaintiff awarded punitive damages "suffers no diminution of his remedy while an unliquidated or modified award undergoes judicial review." Pet. for Cert. at 12. From this, Petitioner reasons that punitive damages which are reduced following remand become "meaningfully ascertained" only after such remanded judgment enters. *Id.* at 15. The premise from which Petitioner embarks is false; such a *new* rule for punitive damages awards would provide a substantial windfall to wrongdoers such as Petitioner and ignores the purposes of both punitive damages and post-judgment interest. Indeed, Petitioner would have Respondents, the victims of conduct which the Tenth Circuit found egregious and malicious, *Klein*, 44 F.3d at 1503-1504 ("the record is replete with evidence of Defendant's reprehensible conduct"), bear the burden of the District Court's error.

"Punitive damages have long been a part of traditional state tort law." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991), and "may properly be imposed to

further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589, 1595 (1996).[2] Denying statutory interest to the injured party until the appellate process is exhausted in no way effectuates the retributive purpose underlying punitive damages. Indeed, the absence of the accrual of post-judgment interest would erode the relative amounts awarded to Respondents. *Cf.*, *BMW*, 116 S.Ct. at 1608-1609 (Breyer, J. concurring) (discussing rates of inflation which would decrease the present value of a punitive damages award over time).

Furthermore, Petitioner's argument ignores the fundamental purpose underlying the imposition of post-judgment interest. 28 U.S.C. § 1961 provides for post-judgment interest on *any* money judgment as a means of both "deterring abuse of the appellate process by dissuading a litigant from pursuing review simply for the purpose of delay", Pet. for Cert. at 15 (citing *Bailey v. Chattem, Inc.*, 838 F.2d 149, 152 (6th Cir.), *cert. denied*, 486 U.S. 1059 (1988)), and compensating "the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage

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[2] Petitioner's argument appears to be based, at least in part, upon *BMW*. However, *BMW* did not change the standard under which federal courts review state court awards of punitive damages. The standard remains the same as in prior case law. "Only when an award can fairly be categorized as 'grossly excessive' in relation to [the state's interest in punishing unlawful conduct and deterring its repetition] does it enter into the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *BMW*, 116 S.Ct. at 1595. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993).

and the payment by the defendant." *Kaiser*, 494 U.S. at 835-836. Accrual of post-judgment interest on an original money judgment only after a remanded judgment provides an incentive to continue frivolous appeals thereby undermining the plain language of 28 U.S.C. § 1961.[3]

Continuing to apply *Kaiser* to punitive damages awards effectuates both the underlying purposes of punitive damages and an award of post-judgment interest, while providing a reasonable and workable balance between a defendant's right to constitutional review of a punitive damages award, *see Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 114 S. Ct. 2331, 2342 (1994), and baseless appeals brought solely for purposes of delay.

CONCLUSION

The standard enunciated by the Supreme Court in *Kaiser* has been uniformly and consistently applied to necessarily different factual and procedural issues. The decisions of the various Circuit Courts of Appeals are clear and no conflict exists therein. Likewise, the uniform application of *Kaiser* to post-judgment interest awards provides the best means available for effectuating the underlying purposes of punitive damage awards as well

[3] Petitioner has twice appealed to the Tenth Circuit Court of Appeals, Case Nos. 92-1232, 92-1233 (Cross-Appeal) and 96-1255, and twice sought certiorari (this Petition and No. 94-1898, *cert. denied*, 116 S.Ct. 58 (1995)) from this Court during the four and a half years since the original judgment was entered.

as awards of post-judgment interest. Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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